FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
Amended **CHARGE AGAINST EMPLOYER**

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
3-CA-243522	July 15, 2019

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Tesla

b. Tel. No. 8770798-3757

c. Cell No.

f. Fax No.

d. Address *(Street, city, state, and ZIP code)*
1339 South Park Ave., Buffalo, NY 14220

e. Employer Representative
(b) (6), (b) (7)(C)

g. e-Mail
(b) (6), (b) (7)(C)@tesla.com

h. Number of workers employed
~350

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Factory

j. Identify principal product or service
Solar roofing tiles

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
See attached.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
United Steel, paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC or United Steelworkers

4a. Address *(Street and number, city, state, and ZIP code)*
Five Gateway Center Room 913 Pittsburgh, PA 15222

4b. Tel. No. 412-562-2529

4c. Cell No. 412-418-4333

4d. Fax No. 412-562-2555

4e. e-Mail
bmanzolillo@usw.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
United Steelworkers

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Brad Manzolillo
(signature of representative or person making charge)

Brad Manzolillo, Organizing Counsel
(Print/type name and title or office, if any)

Address Five Gateway Center Room 913 Pittsburgh, PA 15222

7-12-19
(date)

Tel. No. 412-562-2529

Office, if any, Cell No.

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WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Within the past 6 months, the above named Employer, through its officers, agents, and representatives has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act, as amended, by acts and conduct including interrogation, threats, and surveillance of employees' union and/or protected concerted activities.

On or about (b) (6), (b) (7)(C) 2019 the above named Employer, through its officers, agents, and representatives, terminated (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) and other employees in retaliation for their union support and/or protected concerted activities.

Since on or about (b) (6), (b) (7)(C) 2019, the above named Employer, through its officers, agents, and representatives, has intentionally interfered with (b) (6), (b) (7)(C) efforts to seek employment with other employers in retaliation for (b) (6), union support and/or protected concerted activities.

Morgan Lewis

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July 31, 2019

VIA E-MAIL AND E-FILING

Jessica L. Cacaccio
Field Attorney
National Labor Relations Board, Region 3
130 S. Elmwood Ave., Ste 630
Buffalo, NY 14202-2465

Re: Tesla, Inc., Case Nos. 03-CA-243522 and 03-CA-244618

Dear Ms. Cacaccio:

Tesla, Inc. ("Tesla" or the "Company") provides this position statement in response to the above-referenced charges filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (the "USW" or the "Union") and by (b) (6), (b) (7)(C). As set forth in the Region's July 15, 2019 request for evidence letter, the Union contends that the Company violated Section 8(a)(3) and (1) of the National Labor Relations Act (the "Act") by, on or about (b) (6), (b) (7)(C), 2019, laying off (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (b) (6), (b) and other unidentified employees[1] in retaliation for their alleged union support and/or protected concerted activities. (b) (6), (b) (7)(C) contends that (b) (6), (b) (7)(C) 2019 layoff violated Section 8(a)(3) and (1) of the Act as well. The Company also understands the Union to claim that Tesla (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) violated Section 8(a)(1) of the Act by, on or around (b) (6), (b) (7)(C) (b) (6), 2018,[2] (a) interrogating an employee regarding the employee's union sympathies and activities, (b) threatening plant closure, and (c) engaging in surveillance of picketing activities. Finally, the Union alleges that (b) (6), (b) (7)(C) violated Section 8(a)(1) by telling area employer Welded Tube not to hire (b) (6), (b) (7)(C) in retaliation for (b) (6), (b) (7)(C) union support and/or protected concerted activities.

As discussed in detail below, these allegations lack factual and legal merit and should be dismissed, absent withdrawal. The newly-asserted interrogation, threat, and surveillance

[1] To the extent the Region has received any allegations involving additional employees allegedly unlawfully terminated, the Company respectfully requests notice and the opportunity to respond.

[2] The Company's understanding that this alleged conduct occurred on (b) (6), (b) (7)(C) 2018 is based on our (b) (6), (b) (7)(C), 2019 email exchange. To the extent these allegations include conduct occurring on dates other than (b) (6), (b) (7)(C) the Company respectfully requests notice and the opportunity to respond.

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allegations – added to the Union's July 15 amended charge – are all time-barred under Section 10(b) of the Act because these alleged events (which did not occur) took place more than six months before the charge was filed. In addition, Tesla denies that either (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) made any unlawful statements or engaged in interrogation or surveillance. Neither spoke to (b) (6), (b) (7)(C) or any other employee, about the union on or around (b) (6), (b) (7)(C), 2018 in relation to the picketing or otherwise. Nor did they make any departure from their normal activities to observe the minor demonstration conducted by the USW, International Brotherhood of Electrical Workers ("IBEW"), and other unions on (b) (6), (b) (7)(C) 2018 in the driveway of Tesla's Buffalo plant.

The layoff claim also lacks substantive merit. Tesla discharged the (b) (6), (b) (7) alleged discriminatees in (b) (6), (b) (7)(C) 2019 as part of a Company-wide reduction in force ("RIF") that impacted *thousands of employees across the United States and globally*, including approximately 57 employees in Buffalo, New York. At the Buffalo factory, employees were selected for layoff based on neutral, objective criteria that were consistently applied across the entire population: whether the individual had active discipline on file and their seniority level. The alleged discriminatees were not selected for the RIF because they engaged in any union or protected activities. In fact, although (b) (6), (laid off employee was a (b) (6), (b) (7)(C) another laid off employee had publicly *opposed* the union's organizing efforts, and Tesla is not aware of any union or protected activity by the remaining (b) (6), (b) Moreover, at least three well-known union advocates (who were quoted in media reporting on the (b) (6), (b) (7)(C) union demonstration) were not laid off during this process. The layoff allegation here fails because the evidence does not even establish a *prima facie* case under *Wright Line*, and even if it did, Tesla most certainly has demonstrated a legitimate business justification defense under *Wright Line*.

Finally, the allegation that Tesla interfered with (b) (6), (b) (7)(C) post-RIF efforts to seek area employment is meritless as well. (b) (6), (b) (7)(C) never spoke to anyone at Welded Tube about (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) did, however, respond to an inquiry about (b) (6), (b) (7)(C) from (b) (6), (b) (7)(C) at Welded Tube – who was (b) (6), (b) (7)(C). As explained below, (b) (6), (b) (7)(C) had a short conversation and provided truthful information about (b) (6), (b) (7)(C) prior employment at Tesla, including (b) (6), disciplinary record, and in doing so had no intent to punish (b) (6), (b) (7)(C) for (b) (6), well-known (as publicized in the local media) "union activities." Tesla does not know whether or not Welded Tube hired (b) (6), (b) (7)(C) Besides this one Welded Tube discussion, Tesla is not aware of other conversations between Tesla managers and area employers regarding (b) (6), (b) (7)(C) (nor has the Union or (b) (6), (b) (7)(C) alleged any other specific conversations).

Accordingly, the two pending charges should be dismissed, absent withdrawal. Because the charges have no merit, and in any event have little to no relationship to any active union organizing activities, Section 10(j) injunctive relief is not appropriate under governing Second Circuit precedent.

I. FACTUAL BACKGROUND

A. Tesla and the Buffalo Gigafactory.

Tesla is a technology company, founded in 2003, with a goal of accelerating the world's transition to sustainable energy. Tesla manufactures clean energy generation and storage products – solar panels, solar roof tiles, and battery storage systems – as well as electric vehicles. It is headquartered in Palo Alto, California, with its primary automobile production facility located in

Fremont, California, and its battery and solar panel production facilities (known as "Gigafactories") in Sparks, Nevada and Buffalo, New York. Tesla sales and service centers are located throughout the United States.

Tesla secured its Buffalo factory (Gigafactory 2) through its acquisition of SolarCity in 2016. In 2017, Tesla began production of solar cells and modules in Buffalo. Pursuant to a jobs-creation agreement with the State of New York, Tesla reported having 633 full-time and 4 part-time jobs in the state as of April 2019, more than meeting its commitment to have at least 500 jobs by this deadline.

B. January 2019 Reduction in Force.

Tesla's overall business grew significantly in 2018. Exh. 1. However, in late 2018/early 2019, the Company realized this rapid growth was not sustainable. Tesla faces relentless cost competition in its markets, and this challenge was exacerbated in early 2019, when the federal tax credit for buying an electric vehicle was reduced by 50%. Faced with declining profits from the third to the fourth quarters, the Company decided in January 2019 it was necessary to implement a Company-wide reduction in force ("RIF") in order to align the size of its workforce with production efficiencies and reduce labor costs to support more competitive market pricing for its products. *Id.* ("[W]e unfortunately have no choice but to reduce full-time employee headcount by approximately 7% (we grew by 30% last year, which is more than we can support) and retain only the most critical temps and contractors.") *Id.*

Just a few weeks before the announcement of the Company-wide RIF, (b) (6), (b) (7)(C) Tesla's (b) (6), (b) (7)(C) based in Palo Alto, informed (b) (6), (b) (7)(C), the Buffalo factory' (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) that the Buffalo factory would be included in the upcoming RIF. To implement the reduction, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C), the Buffalo factory's (b) (6), (b) (7)(C) determined that 31 hourly non-exempt employees would be impacted, including 31 employees from the Production Associate I job classification and 2 from the Material Handler I classification. In total, 57 employees would be impacted. They also determined to use objective criteria to select employees for the RIF, which included whether an employee had active disciplinary history and their seniority level.[3] Based on these criteria, all employees with active warning letters on file were selected for layoff, including 15 Production Associate I employees and two Material Handler I employees. Exh. 2. The remaining hourly employees were selected in order of reverse seniority (last in, first out). *Id.*

The (b) (6), (b) (7)(alleged discriminatees in the two pending charges were among the employees that were selected based on active disciplinary warnings. All (b) (6), (b) (7)(had previously received warnings for different infractions:

- (b) (6), (b) (7)(C) was issued a final written warning on (b) (6), (b) (7)(C), 2018 for performance. Exh. 3.
- (b) (6), (b) (7)(C) was issued a final written warning on (b) (6), (b) (7)(C), 2018 for attendance. Exh. 4. (b) (6), had also previously received warnings on (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) 2018 for attendance. Exhs. 5 and 6.

[3] Per (b) (6), (b) (7)(C) instructions, (b) (6), (b) (7)(salaried, exempt employees were also selected.

- (b) (6), (b) (7)(C) was issued a written warning on (b) (6), (b) 2018 for making inappropriate sexual comments to members of (b) (6), work team. Exh. 7.[4]
- (b) (6), (b) (7)(C) was issued a final written warning on (b) (6), (b) (7)(C) 2018 for falsifying (b) (6), timecard. Exh. 9.
- (b) (6), (b) (7)(C) was issued a final written warning on (b) (6), (b) (7)(C) 2018 for performance. Exh. 10. Although that discipline was subsequently reduced to a written warning on (b) (6), (b) (7)(C) 2018 (Exh. 11), the written warning was still in (b) (6), file when the RIF selection was made. (b) (6), had also received a written warning on (b) (6), (b) (7)(C) 2018 for attendance. Exh. 12.
- (b) (6), (b) (7)(C) was issued a final written warning on (b) (6), (b) (7)(C) (b) (2018 for performance. Exh. 13.
- (b) (6), (b) (7)(C) was issued a written warning on (b) (6), (b) (7)(C) 2018 for performance. Exh. 14.

Tesla implemented the layoff effective (b) (6), (b) (7)(C), 2019 and offered the 57 affected Buffalo employees a severance package in exchange for signing a broad waiver of employment-related claims.[5] Since the January 2019 RIF, Tesla has not hired any production associates or material handlers (hourly roles) at the Buffalo factory. Nor has it recalled any laid off production associates or material handlers to the Buffalo factory.

In addition to the Buffalo factory, the January 2019 RIF impacted thousands of employees Company-wide, including the Sparks, NV facility that makes batteries (the RIF size in Sparks was approximately double that of Buffalo). The following list identifies numerous other facilities affected by the RIF:

- Palo Alto, CA: 78 employees
- Phoenix, AZ: 58 employees
- Fremont, CA: 802 employees
- Lathrop, CA: 137 employees
- Las Vegas, NV: 163 employees
- Sparks, NV: 124 employees

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[4] On (b) (6), (b) (7)(C) 2019, (b) (6), before the RIF, (b) (6), (b) (7)(C) was placed on administrative leave with pay pending an investigation based on a new incident where (b) (6) threatened and harassed a coworker. Exh. 8. The investigation was not completed, however, because (b) (6), (b) (7)(C) was laid off (b) (6), later based on (b) (6), pre-existing (b) (6), (b) (7)(C) 2018 discipline. While Tesla could have chosen to complete the investigation, and, if appropriate, discharge (b) (6), (b) (7)(C) for cause and deny (b) (6), severance or other layoff-related benefits, it chose to keep (b) (6), (b) (7)(C) within the RIF process for (b) (6), benefit.

[5] All (b) (6), (b) (7)(of the individuals mentioned in the two pending charges signed separation agreements, pursuant to which they agreed to waive, to the fullest extent permitted by law, all claims arising out of their employment in exchange for two to twelve weeks of severance pay. The Company reserves the right to assert the agreements bar some or all remedial relief were the Region to find merit to any allegations, or violations found in future litigation.

Exhs. 15-20.

C. Alleged Post-RIF Interference with (b) (6), (b) (7)(C) Efforts to Seek Employment.

The Company understands (b) (6), (b) (7)(C), a named individual in the USW's charge, to allege that after the RIF, (b) (6), (b) (7)(C) told area employer Welded Tube not to hire (b) (6), (b) (7)(C) in retaliation for (b) (6), (b) (7)(C) union activity.

This allegation is factually incorrect. (b) (6), (b) (7)(C) never spoke with anyone at Welded Tube – or any other employer – about (b) (6), (b) (7)(C) job application. Rather, Tesla has confirmed that Tesla (b) (6), (b) (7)(C) spoke with (b) (6), (b) (7)(C) Welded Tube (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) about (b) (6), (b) (7)(C) prior Tesla employment. (b) (6), (b) (7)(C) at Welded Tube. In around (b) (6), (b) (7)(C) 2019, (b) (6), (b) (7)(C) texted (b) (6), (b) (7)(C) to ask (b) (6), opinion of (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) who had submitted a job application listing Tesla as a former employer. (b) (6), (b) (7)(C) truthfully told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) had been disciplined for engaging in sexually harassing conduct towards a coworker at Tesla, and that shortly before (b) (6) was laid off, (b) (6), (b) (7)(C) was involved in an altercation with a coworker, which had been under investigation.

This was true information, which (b) (6), (b) (7)(C) provided to (b) (6), (b) (7)(C) because it was relevant to Welded Tube's hiring decision; it had nothing to do with punishing (b) (6), (b) (7)(C) for (b) (6), union activities. (b) (6), (b) (7)(C) has not spoken to any other local employers about (b) (6), (b) (7)(C)

D. Pre-RIF Events At the Buffalo Factory.

The USW's amended charge and the Region's allegations letter cite to several other events or claims before the Section 10(b) period. Below is a factual summary addressing those additional items.

1. <u>July 2018 Minimum Base Hourly Pay Raise</u>.

Every six months, Tesla's Compensation Department reviews set pay rates and compares them to pay rates for similar jobs at competitor companies in the region. Tesla then adjusts its pay rates as necessary to ensure they remain fair and competitive in the labor market. In July 2018, the Compensation Department determined that the minimum base hourly pay at the Buffalo factory should be increased from $14.00 to $15.50 per hour after conducting its market review. Exh. 21. In December 2018, after conducting its market review, the Company determined that no adjustment was necessary because wages were already in line with markets rates.

2. <u>Limited Union Organizing Activities at the Buffalo Factory</u>.

Tesla learned about a year ago that some employees, although seemingly not many, were interested in starting a union organizing drive. Some employees were discussing unions and the pros and cons of representation on the production floor and within earshot of supervisors and managers. No effort was made to prevent or interfere with these discussions, and no ULP charges were filed in or around this time (nor within the Section 10(b) period).

However, some employees raised concerns to supervisors about feeling harassed by union supporters and feeling pressured to support unionizing efforts, which eventually were escalated to

(b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) in or before (b) (6), (b) 2018. To address these concerns, the Company gave an informational presentation to employees in late July 2018. The presentation discussed employee rights to support or not support unions and similar issues regarding union organizing and collective bargaining.

This was the only formal presentation to employees regarding union-related issues in Buffalo. In early (b) (6), (b) (7)(C) 2018, however, after a few incidents involving graffiti containing racial slurs at the Buffalo factory, (b) (6), (b) (7)(C) held stand-downs that covered Tesla's policies against harassment and discrimination and how to report concerns. (b) (6), (b) (7)(C) also held listening sessions with employees. Unions were not a topic of these meetings, and were not discussed.

3. December 13, 2018 Union Demonstration.

Around the same time as the stand-downs and listening sessions, on December 13, 2018 the USW and the IBEW held a demonstration outside the Buffalo factory. The night before the planned demonstration, (b) (6), (b) (7)(C) called (b) (6), (b) (7)(C) to alert (b) (6), (about the demonstration. (b) (6), (b) (was opposed to the Union organizing efforts, but said (b) (6), (had heard about the demonstration from coworkers. (b) (6), (b) (7)(C) notified (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) called the facility's security team to alert them that a demonstration might occur. (b) (6), (b) (7)(C) instructed security to make sure the demonstrators remained on the public way and did not obstruct traffic to and from the facility, but otherwise not to interfere.

On December 13, 2018 demonstrators – including members of several unions and some Tesla employees – stood outside the plant holding signs and passing out leaflets. Several news outlets covered the demonstration and published reports containing photos of the demonstration and quotes from employee organizing committee members, including (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) *See, e.g.*, http://nymag.com/intelligencer/2018/12/tesla-union-push-buffalo.html; https://news.wbfo.org/post/organizers-working-bring-union-power-tesla; https://buffalonews.com/2018/12/13/unions-aim-to-organize-workers-at-tesla-plant/.

Neither (b) (6), (b) (7)(C) nor (b) (6), (b) (7)(C) went out to observe the demonstration or in any way indicated that they were surveilling demonstrators. Neither (b) (6), (b) (7)(C) nor (b) (6), (b) (7)(C) asked any employee about his or her union sympathies or activities on December 13, or on any other day. Nor did they make any threats of plant closure on December 13 or any other day.

II. ARGUMENT

A. The Amended Charge's Interrogation, Threat, and Surveillance Allegations Should Be Dismissed.

The Company understands the Union to allege, in the amended charge, that the Company violated Section 8(a)(1) of the Act on December 13, 2018 when "multiple supervisors interrogated an employee regarding the employee's union sympathies and activities, made threats regarding plant closure, and engaged in surveillance of picketing activities." These allegations are both procedurally and substantively deficient.

1. The Allegations are Time-Barred.

The interrogation, threat, and surveillance allegations – which were not included in the initial charge – are all time-barred under Section 10(b) of the Act. In order to be timely, these allegations had to be filed and served **by June 13, 2019 (at the latest)**, yet the amended charge was not filed **until July 15, 2019** – more than seven months after the alleged conduct took place.

Nor can the original USW charge, filed on June 15, 2019, save these supplemental allegations from dismissal under Section 10(b). *See Redd-I, Inc.*, 290 NLRB 1115, 1115 (1988) (an allegation is not barred under Sec. 10(b) if it occurred within 6 months of a timely filed charge and it is closely related to the allegations of the timely filed charge).

Even assuming that the original June 15 charge would fall within the Section 10(b) period for the December 13 claims - which it very clearly does not - these new allegations are not "closely related" to the original allegations. To determine whether an untimely allegation is closely related to a timely filed charge, the Board considers: (1) whether the allegations are legally related; (2) whether the allegations are factually related; and (3) whether the respondent would raise the same or similar defenses to the two sets of allegations. *Redd-I, Inc.*, 290 NLRB 1115 (1988).

None of these factors are present here. The legal analysis for alleged unlawful statements or surveillance under 8(a)(1), and a layoff/discharge allegation under 8(a)(3), are entirely different, involving different sections of the Act and different legal theories. *See, e.g., WGE Federal Credit Union*, 346 NLRB 982, 983 (2006) (8(a)(3) allegation that employer discriminatorily discharged one employee not same legal theory as untimely allegation that employer made 8(a)(1) threat). Nor are the allegations factually related. The Board will not find allegations are factually related "merely because timely and untimely allegations pertain to events that occurred during or in response to the same union campaign." *Carney Hospital*, 350 NLRB 627, 630 (2007); *see also SKC Electric, Inc.*, 350 NLRB 857, 859 (2007) ("Although the events occurred during the same organizational campaign and the same general time period, a chronological relationship without more is insufficient to support a finding of factual relatedness."). The untimely 8(a)(1) allegations involve statements purportedly made by supervisors at the Buffalo plant as related to a December 13 union demonstration, while the 8(a)(3) allegations involve a company-wide layoff that was decided at the corporate level and impacted the Company's facilities throughout the U.S. and worldwide.

Finally, the defenses to the allegations are entirely different. To defend against the 8(a)(3) allegations, the Company will show (summarized herein) that the RIF was economically-motivated and employees were selected based on objective, non-discriminatory criteria, while the Company's defense to the 8(a)(1) allegations is that they did not occur or otherwise were protected by Section 8(c) of the Act. *See SKC Electric*, 350 NLRB at 859 (employer's defense to Sec. 8(a)(3) refusal-to-hire, layoff, and refusal-to-recall allegation would have been that there was a lawful motive for the employment decisions, while its defense to Sec. 8(a)(1) threat of job loss allegation would have been either that the conduct did not occur or that it did not reasonably tend to interfere with Sec. 7 rights).

2. The New Allegations Lack Substantive Merit.

The Company understands the Union's reference to "multiple supervisors" as engaging in unlawful interrogation, statements, and surveillance to refer to (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C).[6] However, neither (b) (6), (b) (7)(C) nor (b) (6), (b) (7)(C) ever questioned an employee – on December 13 or any other date – about an employee's union sympathies and activities. Nor did they ever threaten any employee with plant closure. These amorphous allegations are factually baseless and should be dismissed even if deemed timely.

The surveillance allegation also lacks merit. Neither (b) (6), (b) (7)(C) nor (b) (6), (b) (7)(C) observed the December 13, 2018 demonstration. And in any event, mere observation of public union activity, such as passing out flyers during a demonstration where the media is present, does not constitute an unfair labor practice. *Compare Wal-Mart Stores*, 340 NLRB 1216, 1223 (2003) (manager's 30-minute observation while sitting on a bench outside the store of union handbilling taking place in the employer's public parking lot did not constitute unlawful surveillance); *with Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), enfd. sub nom. mem. *S.J.R.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993) (an employer violates Sec. 8(a)(1) when it surveils employees engaged in Sec. 7 activity by observing them in a way that is "out of the ordinary" and thereby coercive).[7]

B. Tesla Did Not Violate Section 8(a)(3) with the January 2019 RIF

In order to show unlawful discrimination with employee terminations, there must, at a minimum, be protected activity, knowledge of that activity by the employer, and employer animus or hostility toward that activity. *See Mesker Door, Inc. Inc.*, 357 NLRB 591, 592 (2011); *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Additionally, a Section 8(a)(3) or (1) discrimination violation necessarily depends on a causal connection between employee protected activities and an adverse employment action. *See P.W. Supermarkets*, 269 NLRB 839, 840 (1984). If the General Counsel establishes a *prima facie* case under the *Wright Line* standard, the employer can rebut the allegation by establishing that it would have taken the same adverse action even in the absence of the protected activity. *See NLRB v. Transportation Management*, 462 U.S. 393, 401 (1983) ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation").

Here, there is no *prima facie* case because there is no evidence that (b of the (b) (6), (b) (7)(employees engaged in protected, concerted activity prior to the RIF, or that Tesla knew about such activity. Further, as to all (b) employees, there is no evidence that Tesla harbored animus toward union activity at the Buffalo factory. Nor is there any evidence of a causal connection between alleged activity, whether by (b) (6), (b) (7)(C) or others, and the January 18, 2019 RIF that impacted thousands of

[6] If the Region has evidence that other supervisors or managers were allegedly involved, or further details about the alleged statements or conduct, Tesla respectfully requests an update from the Region and the opportunity to respond before the Region makes a merit/non-merit determination.

[7] Were the Region to view all or part of the vague interrogation, plant closure statement, and surveillance allegations as timely and turning on "credibility" between witnesses, Tesla respectfully requests the right to further engage the Region on these allegations to discuss what additional evidence would be useful to dismiss the charge.

Tesla employees across several countries. Even if a *prima facie* case could be established, there is no violation because the Company would have implemented the RIF and selected the (b) alleged discriminatees regardless of their alleged union support or activities.

1. The Charging Party Cannot Establish a *Prima Facie* Case under *Wright Line*.

The Union cannot establish a *prima facie* case under the *Wright Line* standard because most (or all) of the elements are missing for the (b) individuals at issue. The Company had specific knowledge of union activity by (b) (6), *of the alleged discriminatees* (b) (6), (b) (7)(C), who was a (b) (6), (b) (7)(C), participated in the December 13 demonstration, and was quoted in local press coverage surrounding the event. By contrast, the Company is unaware of any protected concerted activity engaged in by the other (b) (6) alleged discriminatees. In fact, to Tesla's knowledge, at least (b) of those (b) (6), (b) (7)(C) publicly opposed unionization efforts, and the Company has no knowledge regarding any union activities purportedly engaged in by the remaining (b) nor has any evidence of such been disclosed to the Company. The absence of such evidence negates any inference that the union activity at the plant in general was a motivating factor in the RIF. *See, e.g.*, *Tomatek, Inc.*, 333 NLRB 1350, 1353 (2001) ("[C]redible proof of 'knowledge' is a necessary part of the General Counsel's threshold burden and without it, the complaint cannot survive.").

The animus element is lacking as well. As explained above, the untimely and vague interrogation, threat, and surveillance allegations lack factual and legal merit, and as explained below, the post-RIF alleged interference with (b) (6), (b) (7)(C) employment application at Welded Tube lacks merit as well. Nor can animus be inferred from the Company's decision in July 2018 to give a presentation on union-related issues, as employers have this clear right to communicate information to employees under Section 8(c) (and, notably, no employee or union filed a timely ULP charge against the presentation). In the absence of any evidence of animus toward union activity, there is no *prima facie* case. *See In re St. Vincent Med. Ctr.*, 338 NLRB 888, 895 (2003) (finding that the General Counsel had failed to demonstrate animus on the part of the employer and therefore had failed to establish a prima facie case); *Joshua Assocs.*, 285 NLRB 397, 399 (1987) (General Counsel failed to establish a prima facie case "[i]n view of the virtual absence of credible evidence of union animus").

Further, there is no evidence of a causal connection between various alleged union activities, by (b) (6), (b) (7)(C) or others, and the RIF decision or employee selection. The fact that the layoff occurred approximately one month after the December 13 demonstration does not support, by itself, an inference of unlawful motivation. *See, e.g., U.S. Cosmetics Corp.*, 368 NLRB No. 21, slip op. at 2 (2019) (finding timing of wage increases alone was insufficient to show they were announced and implemented to discourage union activity); *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1024 (1999) ("The record in this case shows nothing more than the timing of [the employee's] discharge shortly after the representation election was a coincidence. Such a coincidence, at best, raises a suspicion. However, 'mere suspicion cannot substitute for proof' of unlawful motivation."). In any event, by January 2019, the Company had already been aware of union discussions and activity at the facility for at least six months if not longer. And the timing of the RIF was based on the corporate-wide decision and announcement of staffing reductions – which had nothing to do with Buffalo union activity.

2. Assuming a *Prima Facie* Case, Tesla Easily Meets Its Burden to Show A Legitimate Business Justification for the RIF.

Even if the Union could establish a *prima facie* case, which it cannot, the Company can prove its affirmative defense under the *Wright Line* standard because the RIF was economically motivated and would have taken place even in the absence of the union activities. Thousands of employees at multiple Tesla cites were impacted, including Buffalo. In Buffalo, employees were selected for layoff based on two objective criteria, without regard to their union support, or opposition. The RIF of 57 employees included at least (b) USW supporter (b) (6), (b) (7)(C), at least (b) (6), (b) (7(b) (6), (b) [redacted] Several known USW supporters *were not* included in the RIF and remain employed at Tesla ((b) (6), (b) (7)(C) [redacted] *See, e.g.*, http://nymag.com/intelligencer/2018/12/tesla-union-push-buffalo.html; https://news.wbfo.org/post/organizers-working-bring-union-power-tesla; https://buffalonews.com/2018/12/13/unions-aim-to-organize-workers-at-tesla-plant/.

Tesla summarizes below, in detail, relevant factors and evidentiary bases to conclude the RIF or employee selections during the RIF did not violate the Act:

- *The RIF Was Economically Motivated*. The RIF was part of a Company-wide staffing reduction due to declining profits in certain quarters. The Company had grown by 30 percent the previous year, which was not sustainable. The RIF was necessary to re-align labor costs with production demand, and also to increase demand by enabling the Company to reach more customers who could afford its products. This alone establishes a legitimate business justification. *See Baptista's Bakery, Inc.*, 352 NLRB 547 (2008) (finding layoff was justified by legitimate business reasons where the employer was operating with a recently increased workforce while experiencing faltering sales and a decline in demand). *See also Framan Mechanical, Inc.*, 343 NLRB 408 (2004) ("the crucial factor is not whether the business reason cited by [the employer was] good or bad, but whether [it was] honestly invoked and [was], in fact, the cause of the change. Further, in making this determination, it is well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful.") (quotation omitted); *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 87 (1995) (finding employer economically-motivated layoffs would have taken place even in the absence of union activities); *Gem Urethane Corp.*, 284 NLRB 1349 (1987) (in finding layoff was justified by the employer's financial difficulties, the Board declined to substitute its business judgment for that of the employer).

- *The RIF Impacted Tesla Employees Company-Wide*. The fact that the RIF affected employees Company-wide belies any suggestion that it was related to union activity at the Buffalo plant. It is implausible to suggest the Company implemented the reduction of **thousands of employees** at locations throughout the United States, Canada, and Europe simply to undermine union activity at a single facility in Buffalo, and then to only let go of (b) of the public union supporters but keep several others employed. The Company's business communications to employees about the RIF made no mention of union activity or in any way implied a connection between union activity and the RIF. *See Baptista's Bakery,* 352 NLRB at 547 (memo given to employees and rationale expressed for layoff

was not consistent with a theory that the employer implemented the layoff to discourage union activity where the overall tone of the memo was reassuring and it did not mention union activity or imply a connection between union activity and the layoff). The RIF was real and not an effort to temporarily reduce certain staff, only to then quickly engage in new hiring. *See Framan Mechanical*, 343 NLRB at 408 (the fact that the employer had not hired any additional pipefitters after layoff supported finding a legitimate business justification). As mentioned, since January 2019, Tesla has not hired any new employees, or recalled prior employees, into the Buffalo hourly classifications impacted by the RIF.

- *Employees, Including the Alleged Discriminatees, Were Selected Based on Objective Criteria*. In selecting employees for the RIF, the Company relied upon two objective criteria – prior disciplinary warnings and then seniority (last in, first out). *See American Coal Co.*, 337 NLRB 1044 (2012) (finding employer would have selected the alleged discriminatees for layoff regardless of protected activity where the employer applied neutral objective criteria – including disciplinary history, absences, and performance evaluations – in selecting employees for layoff); *Xaloy, Inc.*, 175 NLRB 693 (1969) (objective selection criteria included absences and attendance); *see also L.A. Water Treatment*, 286 NLRB 868 (1987) (objective selection criteria included performance rankings), reversed on other grounds, *Chromalloy Am. Corp. v. NLRB*, 873 F.2d 1150 (8th Cir. 1989). All (b) (6), (b) (7)(alleged discriminatees had previously received disciplinary warnings. Thus, the (b) alleged discriminatees would have been selected regardless of any alleged union activity.

- *There Is No Evidence of Disparate Treatment or "Singling Out" Union Supporters*. There is no evidence the Company singled out union supporters for this RIF. In fact, the RIF process discharged (b) (6), (b) (7)(C) and left employed (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) Thus, the Company treated employees who supported the union, employees who did not support the union, and employees whose union sympathies were unknown, identically under the objective RIF criteria. Fifty-seven (57) employees were laid off in Buffalo, and there is no evidence or allegation that the other (b employees who were selected engaged in union activity or otherwise supported the USW or another union. *Cato Show Printing Co.*, 219 NLRB 739 (1975) (finding selection of employees for layoff was not discriminatory where selection was based on objective criteria; of the three employees retained, two had signed union cards; and of the seven employees selected, there was only evidence that three were union adherents). If Tesla had desired to retaliate against Union supporters in the RIF selection process, it did a very poor job.

In sum, the Company did not violate the Act when it laid off the (b) alleged discriminatees during the January 2019 RIF, and the RIF allegations should be dismissed absent withdrawal.

C. Tesla Did Not Illegally Interfere with [redacted] Post-RIF Efforts to Obtain Employment With Other Employers.

First off, it is unclear on what factual basis [redacted] alleges that other area employers had contacted Tesla managers to discuss [redacted] prior employment. To Tesla's knowledge, there was only one such conversation, as summarized above, and [redacted] was not a party to the call. In any event, the allegation lacks factual or legal merit. [redacted] did not "retaliate" against [redacted] for Section 7 activities by providing a truthful reference to Welded Tube. Tesla understands that "an employer may not, for the purposes of punishing an employee for exercising Section 7 rights or engaging in union activity, seek to prevent another employer from hiring the employee." *California Gas Transp., Inc.*, 347 NLRB 1314 (2006), enfd. 507 F.3d 847 (5th Cir. 2007). However, "an employer has the right to furnish an employment reference to another employer upon request, *unless his purpose for doing so is to punish the employee for exercising his Section 7 rights*." *James Group Servs., Inc.*, 219 NLRB 158 (1975) (former employer did not violate the Act by responding to a prospective employer's inquiry by stating: "There was a union organization effort which she was involved in, along with others who were also involved, the main reason for her discharge was numerous breaches of discipline, she filed a protest with the NLRB, which was dismissed because there was no basis for her complaint," and that the employee's work and conduct was poor, her ability good, and her attendance was fair).

Here, [redacted] harbored no animus toward [redacted] union activities and never sought to "punish" [redacted] for union activities. Rather, [redacted] provided truthful information regarding [redacted] past employment with Tesla, including that [redacted] had previously been disciplined based on [redacted] coworker's harassment complaint and that [redacted] had been under investigation for an incident involving another co-worker altercation. There is no reasonable basis for inferring that [redacted] purpose in providing this information was to punish [redacted] for exercising [redacted] Section 7 rights. These facts simply do not support an inference that [redacted] provided a negative reference for [redacted] to punish [redacted] for supporting the union. This allegation should therefore be dismissed absent withdrawal. Should the Region have additional, direct evidence of such alleged interference by [redacted] or another Tesla manager, Tesla would like to respond further.

III. SECTION 10(J) RELIEF IS INAPPROPRIATE.

The Region has also requested the Company's position on potential Section 10(j) relief. Section 10(j) injunctive relief should not be pursued for several reasons, chief among them the fact the charges lack merit.

"[A]n injunction under Section 10(j) is an extraordinary remedy," *Kreisberg v. HealthBridge Management, LLC*, 732 F.3d 131 (2d Cir. 2013), and should be withheld unless doing so would severely undermine the efficacy of relief granted after a ruling on the merits, *see Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 369 (2d Cir. 2001) 369 (granting 10(j) injunction where the alleged unlawful labor practices "threatened to render the Board's processes totally ineffective by undermining the force of its remedial power").

In the Second Circuit, in order to issue a Section 10(j) injunction, the district court must apply a two-prong test. First, the court must find reasonable cause to believe that unfair labor practices have been committed. Second, the court must find that the requested relief is just and proper. *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360 (2d Cir. 2001). Neither prong is satisfied here.

A. There Is No Reasonable Cause to Believe That Tesla Violated the Act.

For the reasons stated above, there is no reasonable cause to believe that Tesla violated the Act as alleged. Reasonable cause requires "evidence sufficient to spell out a likelihood of a violation." *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230, 1243 (2d Cir. 1974)). Factual inferences must be "within the range of rationality," *Hoffman*, 247 F.3d at 365, and 10(j) relief will be denied if the Union's "legal or factual theories are fatally flawed." *Silverman v. J.R.L. Food Corp.*, 196 F.3d 334, 335 (2d Cir. 1999)). The Charging Parties lack sufficient evidence to establish the likelihood of a violation, let alone an actual violation. The allegations are vague, generic assertions of legal violations that lack evidentiary support. None of the allegations are supported by reasonable cause.

B. The Relief Sought is Not Just and Proper.

In addition, an injunction in this case would not be just and proper within the meaning of the Act and the standard in the Second Circuit. Injunctive relief under Section 10(j) is just and proper when it is "necessary to prevent irreparable harm or to preserve the status quo." *Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d 462, 469 (2d Cir. 2014). The status quo that must be preserved or restored is that which "existed before the onset of unfair labor practices." *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975). As to irreparable harm, district courts consider whether the employees' Section 7 rights may be undermined by the alleged unfair labor practices and whether any further delay may impair or undermine these rights in the future. *HealthBridge*, 732 F.3d at 142. A court may properly consider petitioner's delay in seeking relief pursuant to Section 10(j). *See Seeler v. H.G. Page & Sons, Inc.*, 540 F. Supp. 77, 79 (S.D.N.Y. 1982) ("inaction is the most compelling evidence against the need for intervention by this court").

First, an injunction would not be just or proper because none of the alleged unfair labor practices are supported by reasonable cause. *See Paulsen v. GVS Properties*, LLC 904 F.Supp.2d 282 (E.D.N.Y. 2012) ("Since the Court has not found reasonable cause to believe that an unfair labor practice occurred, it follows that granting the injunctive relief requested by petitioner would not be just and proper.").

Second, even assuming any allegation had merit (which, as explained above, they do not), the alleged negative impact on either employees or the nascent union organizing campaign would have been insubstantial. As explained above, only (b) of the laid off employees, (b) (6), (b) (7)(C) well-known union supporter. A total of (b) other employees were laid off, and the layoff did *not* include other known union supporters. Employees would thus have no reasonable basis to assume that union activity would result in RIF selection or discharge. (b) of the most active and vocal organizing committee members remain employed at the plant. Union activity is not sufficiently "chilled" that an injunction is necessary.

Finally, the Union's delay in filing these charges – which involve alleged events in December 2018 and January 2019 – weighs heavily against injunctive relief in this case. The Union waited around five months to challenge the RIF, and Charging Party (b) (6), (b) (7)(C) waited even longer – almost six months after the RIF. The Union's delay in filing the untimely 8(a)(1) interrogation, threat, and surveillance claims is even more pronounced, and as a result, these allegations cannot be prosecuted. Delay undermines any claim that emergency injunctive relief is necessary under Section 10(j). *See Paulsen v. CSC Holdings, LLC*, 2016 WL 951535 (E.D.N.Y. 2016) (denying

injunction where 10(j) petition was not filed until six months after the allegedly unlawful termination and noting that given the union's argument that an injunction was necessary, "one would expect that an application for Sec. 10(j) relief would have been made on a more timely basis").

For these reasons, Section 10(j) relief should not be pursued for these two pending charges, were the Region to otherwise find merit to one or more allegations contained within them.

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Please let me know if you have any questions or require additional information to complete the Region's investigation. Because some of the Union's allegations are vague in detail or substance, and as noted in several places herein, if the Region has additional evidentiary information that would otherwise support a merit finding, Tesla seeks the opportunity to engage the Region further before the case is reviewed for a merit/non-merit determination.

Sincerely,

David R. Broderdorf

c: Jaime Bodiford
Ross H. Friedman
Lauren M. Emery

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August 29, 2019

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Re: Tesla
Case 03-CA-243522

Dear Ms. Bodiford, Mr. Friedman, Ms. Emery, Mr. Broderdorf:

This is to advise you that I have approved the withdrawal of the charge in the above matter.

Very truly yours,

/s/PAUL J. MURPHY

PAUL J. MURPHY
Regional Director

cc: (b) (6), (b) (7)(C)
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